Logical Operations Consortium Sdn Bhd v Abdul Rahim bin Abdul Razak & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(W)-2145–11 OF 2016 AND W-02–1977–10 OF 2016
ABANG ISKANDAR, MARY LIM JJCA AND SURAYA OTHMAN J
6 SEPTEMBER 2017

Contract — Act done to benefit another — Contracts Act 1950, s 71 — Whether plaintiff failed to prove its claim for consultancy services under s 71 as evidence showed services were not 'done for another' and was done gratuitously — Whether plaintiff rendered services to defendant for its own benefit with the objective of being awarded a subcontract if defendant secured a project — Whether plaintiff's claim based on quantum meruit also failed as sum claimed for consultancy services was not shown to be reasonable or based on market value for such services

In Appeal No W-02(W)-2145–11 of 2016 herein, the first respondent ('Abdul Rahim') had introduced the managing director/shareholder ('Narayanan') of the appellant ('Logical Operations') and the appellant's freelance consultant ('Uday') to the second respondent ('Silverlake') so that all the parties could collaborate to secure a project by a bank ('Bank Rakyat') to outsource the operation of an Islamic credit card. Narayanan used Logical Operations to provide services for the securement of the project on the understanding that if Silverlake was awarded the project it would subcontract it to a company ('IICSO') set up by Narayanan. After it was awarded the project by Bank Rakyat, Silverlake commenced negotiations with IICSO to decide on the terms of the proposed subcontract but the negotiations broke down and no subcontract was entered into. Nevertheless, Silverlake engaged IICSO to provide pre-operations consultancy services in respect of the project for a sum of RM990,000 which sum it paid fully to IICSO. Sometime thereafter, Logical Operations sued Abdul Rahim and Silverlake in the High Court for payment of RM2,005,687.50 as fees for consultancy services it had rendered for the securement of the project and another RM16m for loss of profits. Apart from allowing only the consultancy services claim against Silverlake, the High Court dismissed all the other claims. The instant appeal by Logical Operations was against those claims which were dismissed while Silverlake appealed against the allowing of the consultancy services claim against it.

Held, dismissing the appeal by Logical Operations and allowing Silverlake's appeal:

(1) The trial judge should have dismissed the consultancy services claim against Silverlake simply because Logical Operations failed to establish the requisite elements to justify its claim being allowed on the basis of either s 71 of the Contracts Act 1950 or on quantum meruit (see para 21).

(2) Section 71 of the Contracts Act 1950 did not apply in the instant case because the evidence led and the findings by the trial judge showed that the consultancy services rendered were not 'done for another' and were intended to be gratuitous in that Logical Operations did not intend to charge Silverlake for payment for services rendered. The services were undertaken by Logical Operations for its own benefit. It was an undisputed, unchallenged fact that the reward for Logical Operations' services was not in the form of payment of any fee by Silverlake but through the award of a subcontract by Silverlake to IICSO should Silverlake secure the project. It was also never pleaded by Logical Operations that it was appointed by Silverlake to provide the consultancy services and there was no evidence at trial to support it (see paras 23, 25 & 29).

(3) The consultancy services claim also failed on the basis of quantum meruit. Logical Operations failed to discharge its burden of proving that the claimed sum was reasonable. No evidence was led to establish the market value of comparable or similar works, the reasonable or objective value of the services rendered or, at the very least, the usual sum imposed by Logical Operations on its other clients for similar services rendered (see para 30).

(4) The trial judge did not err in holding that Abdul Rahim was not liable for the consultancy services claim. Logical Operations did not plead that the consultancy services were done for Abdul Rahim and there was no evidence that Abdul Rahim had benefitted from the project. In fact, Uday testified in cross-examination that Abdul Rahim was not paid by them for the assistance rendered. The trial judge found that Abdul Rahim's role was that of an 'introducer' of the 'attractive opportunity' for Silverlake to succeed in the bid for the project if it collaborated with him and Logical Operations (see paras 18–19).

(5) The trial judge was correct in dismissing the claim for the RM16m loss of profits on the ground that it was unproven. The trial court held that the claim was based merely on projections unsupported by evidence. The projections were based on a single sheet document known as 'profit forecasts for IICSO' prepared by Logical Operations or IICSO and were entirely dependent upon assumptions and parameters determined by Logical Operations without any evidence in support. Even if there had been any loss of profits, the party that would have had the right to claim for loss of profits was IICSO and not Logical Operations. It was

important to note from the evidence that the parties never agreed on the terms of the proposed subcontract or as to division of profits or on the financial terms of the subcontract and that both Logical Operations and Silverlake were aware that there was no contract between them and all works were done in good faith (see paras 36–38, 43 & 45–47).

[Bahasa Malaysia summary

Dalam Rayuan No W-02(W)-2145–11 Tahun 2016, responden pertama ('Abdul Rahim') telah memperkenalkan pengarah urusan/pemegang saham ('Narayanan') perayu ('Logical Operations') dan konsultan bebas peryau ('Uday') kepada responden kedua ('Silverlake') agar semua pihak-pihak boleh bergabung untuk mendapat projek oleh bank ('Bank Rakyat') bagi memberi sumber luar operasi kad kredit Islam. Narayanan menggunakan Logical Operations untuk memberikan perkhidmatan bagi pemerolehan projek itu dengan persefahaman bahawa sekiranya Silverlake mengawardkan projek itu ia akan subkontraknya kepada syarikat ('IICSO') yang ditubuhkan oleh Narayanan. Selepas ia mengawardkan projek itu oleh Bank Rakyat, Silverlake memulakan rundingan dengan IICSO untuk memutuskan terma-terma cadangan subkontrak itu tetapi rundingan itu tidak berjaya dan tiada subkontrak dimasuki. Walau apa pun, Silverlake telah melantik IICSO untuk memberikan perkhidmatan konsultasi pra operasi berkaitan pojek tersebut untuk sejumlah RM990,000 yang mana jumlah itu telah dibayar sepenuhnya kepada IICSO. Selepas itu, Logical Operations telah menyaman Abdul Rahim dan Silverlake di Mahkamah Tinggi untuk bayaran RM2,005,687.50 sebagai fi perkhidmatan konsultasi yang diberikannya bagi pemerolehan projek tersebut dan RM16 juta lagi untuk kehilangan keuntungan. Selain daripada membenarkan hanya tuntutan perkhidmatan konsultasi terhadap Silverlake, Mahkamah Tinggi telah menolak semua tuntutan lain. Rayuan ini oleh Logical Operations adalah terhadap tuntutan-tuntutan yang telah ditolak manakala Silverlake merayu terhadap membenarkan tuntutan perkhidmatan konsultasi terhadapnya.

Diputuskan, menolak rayuan oleh Logical Operations dan membenarkan rayuan Silverlake:

(1) Hakim perbicaraan sepatutnya menolak tuntutan perkhidmatan konsultasi terhadap Silverlake hanya kerana Logical Operations telah gagal membuktikan elemen-elemen yang dikehendaki untuk mewajarkan tuntutannya dibenarkan berdasarkan sama ada s 71 Akta Kontrak 1950 atau kuantum meruit (lihat perenggan 21).

(2) Seksyen 71 Akta Kontrak 1950 tidak terpakai dalam kes ini kerana keterangan yang dikemukakan dan dapatan oleh hakim perbicaraan menunjukkan bahawa perkhidmatan konsultasi yang diberikan bukan 'done for another' dan diniatkan sebagai hadiah yang mana Logical Operations tidak berniat untuk mengenakan Silverlake bayaran untuk

perkhidmatan yang diberikan. Perkhidmatan tersebut telah dilakukan oleh Logical Operations untuk manfaatnya sendiri. Ia fakta yang tidak dipertikaikan, tidak dicabar bahawa ganjaran untuk perkhidmatan Logical Operations bukan dalam bentuk bayaran apa-apa fi oleh Silverlake tetapi melalui award suatu subkontrak oleh Silverlake kepada IICSO jika Silverlake mendapat projek tersebut. Ia juga tidak dipli oleh Logical Operations bahawa ia telah dilantik oleh Silverlake untuk memberikah perkhidmatan konsultasi dan tiada keterangan semasa perbicaraan untuk menyokongnya (lihat perenggan 23, 25 & 29).

(3) Tuntutan perkhidmatan konsultasi juga gagal berdasarkan kuantum meruit. Logical Operations gagal untuk melepaskan beban buktinya bahawa jumlah yang dituntutan adalah munasabah. Tiada keterangan dikemukakan untuk membuktikan nilai pasaran perbandingan atau kerja sama, nilai munasabah atau objektif perkhidmatan yang diberikan atau, sekurang-kurangnya, jumlah biasa yang dikenakan oleh Logical Operations ke atas pelanggannya untuk perkhidmatan sama yang diberikan (lihat perenggan 30).

(4) Hakim perbicaraan tidak terkhilaf dalam memutuskan bahawa Abdul Rahim tidak bertanggungjawab untuk tuntutan perkhidmatan konsultasi itu. Logical Operations tidak mempli bahawa perkhidmatan konsultasi itu telah dilakukan untuk Abdul Rahim dan tiada keterangan bahawa Abdul Rahim mendapat manfaat daripada projek tersebut. Bahkan, Uday telah memberi keterangan dalam pemeriksaan balas bahawa Abdul Rahim tidak dibayar oleh mereka untuk bantuan yang diberikan. Hakim perbicaraan mendapati bahawa peranan Abdul Rahim adalah sebagai 'introducer' untuk 'attractive opportunity' agar Silverlake berjaya dalam bidaan untuk projek tersebut jika ia berkolaborasi dengannya dan Logical Operations (lihat perenggan 18–19).

(5) Hakim perbicaraan adalah betul dalam menolak tuntutan RM16 juta untuk kehilangan keuntungan atas alasan bahawa ia tidak dibuktikan. Mahkamah perbicaraan memutuskan bahawa tuntutan itu hanya berdasarkan anggaran yang tidak disokong keterangan. Anggaran itu berdasarkan sehelai dokumen dikenali sebagai 'profit forcasts for IICSO' yang disediakan oleh Logical Operations atau IICSO dan bergantung sepenuhnya kepada andaian dan parameter yang ditentukan oleh Logical Operations tanpa apa-apa keterangan sokongan. Walaupun terdapat apa-apa kehilangan keuntungan, pihak yang mempunyai hak untuk menuntut kehilangan keuntungan adalah IICSO dan bukan Logical Operations. Ia adalah penting untuk diperhatikan daripada keterangan bahawa pihak-pihak tidak bersetuju dengan terma-terma cadangan subkontrak atau pembahagian keuntungan atau terma-terma kewangan subkontrak dan bahawa kedua-dua Logical Operations dan Silverlake menyedari bahawa tiada kontrak antara mereka dan semua kerja

A dilakukan dengan niat baik (lihat perenggan 36–38, 43 & 45–47).]

Notes

For a case on Contracts Act 1950, s 71, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3213.

B

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500, CA (refd)

C *Benedetti and another v Sawiris and others* [2014] AC 938, SC (refd)

Bonham-Carter v Hyde Park Hotel (1948) 64 TLR 177, KBD (refd)

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (folld)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546, CA (refd)

D *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002, CA (refd)

UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd and Anor [2010] 9 CLJ 785, FC (refd)

E

Legislation referred to

Contracts Act 1950 s 71

Appeal from: Civil Suit No W-02–1977–10 of 2016 (High Court, Kuala F Lumpur)

Elaine Siaw (Raja, Darryl & Loh) in Civil Appeal No W-02(W)-2145–11 of 2016 for the appellant.

Tieh Siaw Siong (SS Tieh) in Civil Appeal No W-02(W)-2145–11 of 2016 for the G *respondent.*

Siti Nurani bt Md Zahidi (Rashid Zulkifli) in Civil Appeal No W-02–1977–10 of 2016 for the first respondent.

Elaine Siaw (Raja, Darryl & Loh) in Civil Appeal No W-02–1977–10 of 2016 for the second respondent.

H

Suraya Othman J (delivering judgment of the court):

INTRODUCTION

I **[1]** Before this honorable court, there are two appeals consolidated pursuant to an order dated 9 January 2017:

(a) W-02(W)-2145–11 of 2016; and

(b) W-02–1977–10 of 2016.

[2] For ease of reference, parties will be referred to herein as they were during the proceedings at the High Court. The plaintiff is Logical Operations Consortium Sdn Bhd, the first defendant Abdul Rahim bin Abdul Razak and the second defendant Silverlake System Sdn Bhd.

[3] Appeal W-02(W)-2145–11 of 2016 is the appeal by the plaintiff against part of the decision of the High Court dated 30 September 2016 in dismissing the plaintiff's claim against the first and second defendants for RM16m, being loss of profits and dismissing the plaintiff's claim against the first defendant for RM2,005,687.50 being business procurement/consultancy services rendered ('consultancy services').

[4] Appeal W-02–1977–10 of 2016 is the appeal by the second defendant against the decision of the High Court dated 30 September 2016 in holding the second defendant liable to the plaintiff for RM2,005,687.50 for consultancy services rendered.

[5] We heard the appeal on 15 May 2017 and dismissed the plaintiff's appeal and allowed the second defendant's appeal. We now give our reasons for our decision.

THE PARTIES

[6] The plaintiff is a private limited company incorporated in Malaysia. The plaintiff's shareholders and directors are Dr Singanallur Ventakaraman Narayanan ('Narayanan') and his wife, Uma @ Sigappi a/p Singaram. The first defendant was at the material time an employee of Bank Islam and the second defendant is a private limited company incorporated in Malaysia.

BACKGROUND FACTS

[7] In 2006, Bank Kerjasama Rakyat Malaysia Bhd ('Bank Rakyat') was looking to award a project which involved the outsourcing of the operation of an Islamic credit card ('the project').

[8] The first defendant, then an employee of Bank Islam introduced Narayanan and one Udhaya Kumar a/l Naranam @ Narayanan ('Uday') to the second defendant. All the parties then collaborated in order to secure the project by Bank Rakyat to the second defendant.

[9] For the purposes of this said collaboration, Narayanan used his company, Logical Operations Consortium Sdn Bhd ('the plaintiff'), to provide services for the procurement of the project. It is to be noted that Narayanan is

A both a shareholder and managing director of the plaintiff. Uday on the other hand was a freelance consultant engaged by the plaintiff.

[10] The understanding between the parties had been that if the second defendant was successful in securing the project from Bank Rakyat, then the second defendant would be the main contractor and Narayanan will set up a corporate vehicle which would be the subcontractor to the project.

[11] Towards this end, IICS Operations Sdn Bhd ('IICSO') was incorporated on 20 August 2007 with Narayanan, one Md Hidzir bin Adam and one Liana Sari bt Hafizar as shareholders. The directors of IICSO were Narayanan, his wife Uma, Uday and Rajendran a/l KK Raman (both appointed on 14 October 2008).

[12] The plaintiff, through Uday and Rajendran, worked with the first and second defendants to prepare a proposal to bid for the project. The second defendant then submitted the proposal to Bank Rakyat and was eventually awarded the project by Bank Rakyat on 21 November 2007.

[13] The second defendant then commenced negotiations with IICSO (through Narayanan and Uday) on the terms of the subcontract. Negotiations broke down and no subcontract was entered into between the second defendant and IICSO. Despite this, on 20 May 2008, the second defendant entered into a contract with IICSO for pre-operations consultancy services in respect of the project for the sum of RM990,000 which sum was fully paid by the second defendant to IICSO.

[14] On 1 June 2009, the plaintiff issued a demand notice against the defendants for the sum of RM2,005,687.50 being the plaintiff's fee for the consultancy services rendered by the plaintiff to the defendants to secure the project.

[15] The plaintiff commenced an action against the defendants at the High Court in Malacca. The plaintiff claimed for the sum of RM2,005,687.50 for consultancy services and a sum of RM16m being loss of profits against both the defendants.

[16] The High Court dismissed the plaintiff's claim for loss of profits against both the defendants and dismissed the plaintiff's claim for consultancy services against the first defendant. However, the plaintiff's claim for consultancy services against the second defendant was allowed by the High Court.

OUR DECISION

Claim for consultancy services

[17] At the outset, the claim for consultancy services of RM2,005,687.50 by the plaintiff against the defendants was made under s 71 of the Contracts Act 1950 and/or on the basis of quantum meruit. The trial judge dismissed the plaintiff's claim against the first defendant but allowed the plaintiff's claim against the second defendant.

[18] The trial judge found that the first defendant's role was that of an 'introducer' of the 'attractive opportunity' for the second defendant to succeed in the bid for the project with the collaboration of the plaintiff, the first and the second defendants. Although the trial judge did not make a specific finding that the first defendant personally benefited from the project, the trial judge found the first defendant not personally liable to the plaintiff under s 71.

[19] Further it must be noted that the plaintiff did not plead in the statement of claim that the consultancy services were in fact done for the first defendant and there was also no evidence led by the plaintiff to show that the first defendant benefitted from the project. In fact, Uday testified in cross-examination that the first defendant was not paid by them for the assistance rendered. In such circumstances, we are of the view, that the learned trial judge has not erred in her decision that the first defendant is not liable to the plaintiff for RM2,005,687.50 for consultancy services rendered. Her decision to dismiss the plaintiff's claim against the first defendant, therefore, does not merit appellate intervention and is thus affirmed.

[20] As for the second defendant, the following findings made by the learned trial judge are reproduced below. The trial judge found that:

(a) no representations were made by the second defendant to the plaintiff. In fact representations were only made by the first defendant;

(b) the second defendant did not appoint the plaintiff to provide consultancy services;

(c) the works that were carried out by the plaintiff was in collaboration with the second defendant;

(d) no fees were requested by the plaintiff from the second defendant; and

(e) there was no agreed rate of payment for the plaintiff.

[21] We are of the view that armed with these findings of facts made above, the claim against the second defendant should have been dismissed by the learned trial judge simply because the plaintiff had failed to establish the requisite elements to justify for its claim to be allowed on the basis of either s 71 of the Contracts Act 1950 and/or quantum meruit. Our reasons are as follows.

[22] First, in the statement of claim, representations were specifically alleged to have been made by the first defendant as an individual whilst only general assertions of representations were made against the second defendant without going into particulars as to who made the alleged representations on behalf of the second defendant. At trial, Narayanan admitted that it was the first defendant who made the alleged representations and he was unsure whether the second defendant's representative who attended the meeting made any representations.

[23] Second, the plaintiff did not plead that it was appointed by the second defendant to undertake the consultancy services and there was no evidence at trial to support it.

[24] Third, when the consultancy services were rendered by the plaintiff through Narayanan and Uday, they were rendered for the plaintiff's own benefit in that Narayanan and his colleagues through their collaboration with the second defendant will be rewarded with the appointment of IICSO as a subcontractor to the second defendant under the project.

[25] Fourth, the consultancy services were intended to be gratuitous in that the plaintiff did not intend to charge the second defendant for payment for services rendered. Instead, it is an undisputed and unchallenged fact that the reward for the plaintiff would translate into a different form and not into the form of monetary compensation or payment from the second defendant. As stated earlier, the reward will be through the award of a subcontract to IICSO. In other words, IICSO will be a subcontractor to the main contractor, the second defendant, on terms to be agreed upon, should the project be awarded to the second defendant. The document in the form of emails between the parties supports this since no reference were made in them to any fee or payment of consultancy services.

[26] Let us look at s 71 of the Contracts Act 1950. Section 71 provides as follows:

Obligation of person enjoying benefit of non-gratuitous act

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[27] In support of a claim under s 71, the Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 held that four conditions must be satisfied to establish a claim under s 71:

> It has been common ground before Their Lordship that four conditions must be satisfied to establish a claim under s 71.
>
> The doing of the act or delivery of the thing referred to in the section:
>
> (1) must be lawful;
>
> (2) must be done for another person;
>
> (3) *must not be intended to be done gratuitously;*
>
> (4) must be such that the other person enjoys the benefit of the act or delivery.
>
> In Their Lordship's judgment these matters must be answered at the time that the act is done or delivered and this, their Lordships think, is of fundamental importance. (Emphasis added.)

[28] The Court of Appeal in *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161; [2015] 9 CLJ 1002, was of the view that:

> Section 71 is the statutory embodiment of the common law principle of quantum meruit, which provide for just compensation as the measure of work done as opposed to contractual damages.

[29] In our instant case, the evidence led and the findings made by the learned trial judge show that the consultancy services rendered by the plaintiff were not done for another and were intended to be gratuitous. The services were undertaken by the plaintiff for its own benefit. As such s 71 is not applicable.

[30] Fifth, the plaintiff is claiming RM2,005,687.50 for consultancy services rendered. The plaintiff failed in discharging its burden to prove the determination of a reasonable sum which is crucial in order to sustain a claim premised on quantum meruit. In this context, no evidence at all was led by the plaintiff to establish:

(a) the market value of comparable or similar works;

(b) the reasonable or objective value of the services rendered by the plaintiff; or

A (c) at the very least, the usual sum imposed by the plaintiff on its other clients for similar services rendered.

[31] In *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546, in deciding whether the appellant was entitled to recover on quantum meruit for work done, the Court of Appeal held that the amount representing the work done is usually calculated by reference to the market price of the value of services.

> [44] It must be borne in mind that when the appellant contractor is seeking a quantum meruit it is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. *And this is usually calculated by reference to the market price of value of the services.* (Emphasis added.)

[32] In the Supreme Court case of *Benedetti and another v Sawiris and others* [2014] AC 938, Lord Reid JSC held that to determine the amount of work done the objective value of the services at the time of receipt, that is to say the price which a reasonable person in the defendant's position would have paid for the services has to be taken into consideration by the court and that this exercise by the court may involve the exercise of judgment, but does not involve the exercise of discretion.

> In dealing with the evidence, the trial judge starting point was that a 'claim to a quantum meruit gives the court a wide discretion to award what it considers to be a fair and reasonable sum for the services ...
>
> That is not the correct approach. As I have explained, *the court has to determine the objective value of the services at the time of receipt, that is to say the price which a reasonable person in the Defendant's position would have paid for the services. That exercise may involve the exercise of judgment, but it does not involve the exercise of discretion.* (Emphasis added.)

[33] In our present case, no evidence was led as to what would be a reasonable fee for the consultancy services rendered. The only justification forwarded by the plaintiff was a single sheet of paper containing tables drawn up by the plaintiff stating the amount of time spent with hourly rates of RM625. This document, however, in our view suffers from the defect that it shows no proof of time entries and hours spent on work allegedly done and contains no justification to support the unilateral hourly rate of RM625 or any rate for that matter at all. This was entirely a self-serving document offering no independent corroborative value, or be evidence of any credible value.

[34] In that light, the learned trial judge had rejected the said evidence as being inadmissible. As such, there was really nothing left at all to substantiate the plaintiff's claim. Therefore, we are unanimous in our view, that having rejected that piece of evidence, the learned trial judge erred when she went on to find the second defendant liable to compensate the plaintiff for the consultancy services rendered and in allowing the plaintiff's claim against the second defendant. We therefore allow the appeal by the second defendant and set aside the decision of the High Court in that regard.

Claim for RM16m for loss of profits

[35] With regards to this appeal, it is clear from a perusal of the pleadings and the evidence adduced during trial at the High Court that the plaintiff's claim where loss of profits is concerned is premised on certain representations alleged to have been made by the defendants. It is the defendants' contention that they never made any representations to the plaintiff that could possibly give rise to a legitimate claim for loss of profits.

[36] The High Court held at p 65 of its judgment that the loss of profit claim is based merely on projections which in any event was not supported by any evidence on which reliance can be placed upon for the purpose of supporting the claim on a legal basis.

[37] Without any supporting evidence to substantiate its claim, the plaintiff's claim falls flat and the learned trial judge was correct in ruling that the plaintiff's claim was not substantiated and thus unproven. This, in our considered view, is a correct finding made by the learned trial judge as the burden of proof lies with the plaintiff to prove its claim. The plaintiff cannot simply as decided by *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 p 178 'throw them at the head of the court' to satisfy its burden of proving the amount claimed.

[38] What is even more significant is the fact that the plaintiff's projections were based on a single sheet document known as 'profit forecasts for IICSO' prepared by the plaintiff or IICSO. The projections were entirely dependent upon assumptions and parameters determined by the plaintiff without any evidence in support. The document was objected to by the defendants and the objection was upheld by the learned trial judge who eventually ruled the said document inadmissible during the trial proceedings.

Representations by defendants

[39] We now turn to consider the issue of the representations that was allegedly made by the second defendant to the plaintiff.

[40] The High Court held at pp 58–60 of its judgment that at all material times representations were made by the first defendant and not the second defendant.

[41] This finding is not without basis as the plaintiff's assertions on the representations made were directed at the first defendant and not the second defendant.

[42] It remains unclear even to us what are the specific representations made by the second defendant to the plaintiff. Even during the trial, Narayanan had testified that it was the first defendant who made all the alleged representations and he was unsure as to the representations made by the second defendant.

[43] We pause here to note that having perused the evidence adduced and the judgment of the learned trial judge, the party who claimed to have relied on the representations made by the defendants (the plaintiff) was not the same party that had purportedly lost potential profits under the arrangement which would be IICSO. In other words, it would be IICSO and not the plaintiff who would have the right of action to a claim for profits.

[44] At the same time, it is trite law that mere representations that do not induce parties to enter into a contract are not ordinarily actionable. Reference in this context is made to the Court of Appeal's case of *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500.

[45] Having said that, we are also minded to refer to the important fact that there was no agreement between parties as to the terms of the subcontract. This was highlighted by the learned trial judge at pp 65–66 of her grounds of judgments.

[46] This important fact must be viewed in light of the evidence led by the plaintiff through Narayanan who had admitted:

(a) there was no agreement between parties on charges and the payment schedule for the proposed subcontract;

(b) no agreement exists between the parties on the terms of the proposed subcontract;

(c) IICSO were not ready to sign the draft subcontract agreement that existed as of April 2008; and

(d) no agreement was ever signed between IICSO and the second defendant.

[47] Another important point to note is the evidence of Uday where he had admitted that: A

(a) there was no agreement between the parties on the division of profits;

(b) there was no agreement between the parties on the financial terms of the proposed subcontract; B

(c) the plaintiff was aware that no agreement exists between parties as long as a contract is not signed between parties; and

(d) both the plaintiff and the second defendant were aware that there was no contract between them and all works were done in good faith. C

[48] As such, we find no reason to interfere with the findings made by the learned trial judge which were principally on findings of facts. It is trite law that findings of facts made by the trial judge are rarely reversed at the appellate level unless there is a serious error, which we find none in the present case. This rule emanates from the premise that the trial judge, having the benefit of audio visual advantage, having seen first-hand the accounts provided by the witnesses, is the best person to deal with findings of facts. The Federal court case of *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd and Anor* [2010] 9 CLJ 785 is cited in support of this principle. D E

[49] In the circumstances and for the reasons stated above, we are of the view that the decision of the trial judge was correct. Accordingly, we therefore dismissed this appeal and affirmed the decision of the learned trial judge. F

CONCLUSION

[50] In respect of Appeal No W-02(W)-2145–11 of 2016, we unanimously dismiss the plaintiff's appeal and affirm the decision of the learned trial judge. G

[51] In respect of Appeal No W-02–1977–10 of 2016, the second defendant's appeal is allowed and the decision of the learned trial judge allowing the plaintiff's claim against the second defendant is set aside. 50% of the judgement sum ordered to be paid by the second defendant via order dated 28 February 2017 is refunded to the second defendant with interest as accrued. H

[52] As to costs, costs of RM80,000 is awarded to the second defendant (here and below). The first defendant is awarded costs of RM40,000. Both costs being subject to the payment of allocator fees. We also order that deposits be refunded to respective appellants. I

Ordered accordingly.

Reported by Ashok Kumar